



SEC Staff Recommendations to Amend Regulation S-K Pursuant to Section 72003 of the FAST Act

On November 23, 2016, the staff (the “Staff”) of the Securities and Exchange Commission (the “SEC”) released its “Report on Modernization and Simplification of Regulation S-K” (the “Report”).¹ Although the Report is part of the Staff’s broader ongoing and comprehensive review of Regulation S-K,² the Report was specifically mandated by Section 72003 of the Fixing America’s Surface Transportation Act (the “FAST Act”) passed by Congress in December 2015.

The FAST Act includes two sections, Sections 72002 and 72003, which direct the SEC to modernize and simplify the requirements of Regulation S-K. Section 72002 aims to make SEC reporting less burdensome, especially for smaller companies such as emerging growth companies (“EGCs”), by scaling back on requirements or eliminating duplicative provisions, while Section 72003 directs the SEC, in consultation with the SEC’s Investor Advisory Committee and the Advisory Committee on Small and Emerging Companies, to undertake a study and issue a report on the requirements of Regulation S-K. Pursuant to Section 72003, the Report covers: (1) all findings and determinations made in carrying out the required study; (2) specific and detailed recommendations on modernizing and simplifying the requirements under Regulation S-K in a manner that reduces the costs and burdens on companies while still ensuring that all material information is provided; and (3) specific and detailed recommendations on ways to improve the readability and navigability of disclosure documents and to discourage repetition and the disclosure of immaterial information.³ The Report does not address the four releases previously issued by the Staff that are also responsive to Section 72003 of the FAST Act.⁴ The recommendations contained in the Report are not final and are open for public comment. Additionally, the SEC is required to present to Congress proposed rules implementing its recommendations for amending Regulation S-K by November 23, 2017.

¹ See “Report on Modernization and Simplification of Regulation S-K” (Nov. 23, 2016), available at: <https://www.sec.gov/reportspubs/sec-fast-act-report-2016.pdf>.

² In December 2013, the Staff issued a report mandated by Section 108 of the Jumpstart Our Business Startups (JOBS) Act addressing the disclosure requirements under Regulation S-K. As a follow-up to this report and at the request of the SEC Chair Mary Jo White, the Staff continues, pursuant to this mandate, to look for ways to improve the disclosure requirements under Regulation S-K. See “Report on Review of Disclosure Requirements in Regulation S-K” (Dec. 2013), available at: <https://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf>.

³ FAST Act § 72003(c).

⁴ See “Request for Comment on Subpart 400 of Regulation S-K Disclosure Requirements Relating to Management, Certain Security Holders and Corporate Governance Matters,” SEC Release No. 33-10198 (Aug. 25, 2016) [81 FR 59927 (Aug. 31, 2016)], available at: <https://www.sec.gov/rules/other/2016/33-10198.pdf>; “Modernization of Property Disclosures for Mining Registrants,” SEC Release No. 33-10098 (June 16, 2016) [81 FR 41651 (June 27, 2016)], available at: <https://www.sec.gov/rules/proposed/2016/33-10098.pdf>; “Amendments to Smaller Reporting Company Definition,” SEC Release No. 33-10107 (June 27, 2016) [81 FR 43130 (July 1, 2016)], available at: <https://www.sec.gov/rules/proposed/2016/33-10107.pdf>; “Disclosure Update and Simplification,” SEC Release No. 33-10110 (July 13, 2016) [81 FR 51607 (Aug. 4, 2016)], available at: <https://www.sec.gov/rules/proposed/2016/33-10110.pdf>; and “Exhibit Hyperlinks and HTML Format,” SEC Release No. 33-10201 (Aug. 31, 2016) [81 FR 62689 (Sept. 12, 2016)], available at: <https://www.sec.gov/rules/proposed/2016/33-10201.pdf>.

As outlined in the table below, the Report addresses multiple Items of Regulation S-K in varying detail, with the majority of the recommendations relating to Subpart 500. The Report also presents two recommendations regarding the “manner of delivery” for periodic and current reports. Each of the Staff’s recommendations seeks to streamline the SEC reporting process for registrants and/or make the disclosure itself, or access to the disclosure, more user-friendly for investors.

Item of Regulation S-K	Proposed Staff Recommendations
Item 10(d) (General)	<ul style="list-style-type: none"> Permit incorporation by reference of documents that have been on file for more than five years by using hyperlinks to such documents, together with a description of the location (in the event of a malfunctioning hyperlink). Permit incorporation by reference of financial statements to satisfy requirements of Regulation S-K (for example, disclosure of related-party transactions pursuant to Item 404(a) could be addressed by reference to the financial statement footnotes); this recommendation would not allow the use in financial statements of incorporation by reference to disclosure in other SEC filings.
Item 102 (Description of Property)	<ul style="list-style-type: none"> Require disclosure of physical properties only to the extent that the physical properties are material to the registrant’s business (currently, disclosure is required for physical properties that are materially important to the registrant), and consider combining with the description of business required under Item 101(c).
Item 303 (Management’s Discussion and Analysis)	<ul style="list-style-type: none"> Item 303(a): require registrants to provide a period-to-period comparison for only the two most recent fiscal years presented in the financial statements and include a hyperlink to the prior year’s annual report for reference or, alternatively, require registrants to discuss changes in results of operations and financial condition over the two- or three-year period presented in the financial statements and discuss known material trends and uncertainties impacting performance during the period presented in the financial statements (currently, many registrants interpret Item 303(a) as requiring a line-by-line analysis of immaterial changes over a three-year period). Items 303(a)(1) and 303(a)(5): eliminate the requirement of tabular disclosure of contractual obligations and instead require a hyperlink to the relevant financial statement notes in the same SEC filing, as well as an explanation of (i) any material changes to contractual obligations and (ii) the registrant’s ability to pay such obligations over time.
Item 401 (Directors, Executive Officers, Promoters and Control Persons)	<ul style="list-style-type: none"> Eliminate the requirement to identify executive officers by name, age, position and term of office in the registrant’s proxy or information statement, if the same information is already provided in the registrant’s Form 10-K.
Item 405 (Compliance with Section 16(a) of the Securities Exchange Act of 1934)	<ul style="list-style-type: none"> Allow registrants to rely solely on a review of Forms 3, 4 and 5 and any amendments thereto when determining whether there are any delinquent Section 16 filers, and eliminate the requirement for Section 16 filers to furnish reports filed by them to the registrant. Require registrants to include a reference to delinquent Section 16 filers only when applicable.
Item 407 (Corporate Governance)	<ul style="list-style-type: none"> Item 407(d)(3): update the outdated reference to AU Section 380. Item 407(e)(5): add a reference to EGCs clarifying that EGCs are not subject to the disclosure requirements under Item 407(e)(5), which refers to the compensation committee report provided in connection with the registrant’s annual report.

Item of Regulation S-K	Proposed Staff Recommendations
<p>Item 501 (Forepart of Registration Statement and Prospectus Cover Page)</p>	<ul style="list-style-type: none"> Item 501(b)(1): eliminate the requirement for a registrant to change its name if the registrant’s name cannot be sufficiently differentiated from that of a “well known” company. Item 501(b)(3): allow for disclosure of the method for computing the public offering price of securities elsewhere in the prospectus, with a cross-reference and hyperlink for ease of use on the cover page of the prospectus (currently, Item 505(b)(3) requires disclosure of the method for computing the public offering price of securities on the cover page of the prospectus); this recommendation would not change the requirement for securities being offered at market price or at a price based on market price to be disclosed on the cover page of the prospectus. Item 501(b)(4): require disclosure of the principal U.S. public trading market where the securities being offered will be quoted (currently, disclosure is only required for securities listed on a national securities exchange). Item 501(b)(10): shorten the “subject to completion” legend by only requiring the portion relating to state securities law when applicable to the offering of securities. Items 501(b)(10) and 501(b)(11): combine paragraphs (b)(10) and (b)(11) to eliminate duplicative language (currently, each requires the use of the “subject to completion” legend).
<p>Item 503 (Risk Factors)</p>	<ul style="list-style-type: none"> Move “Risk Factors” to Subpart 100 of Regulation S-K to clarify that risk factors are required by both offering documents and periodic reports.
<p>Item 508 (Plan of Distribution)</p>	<ul style="list-style-type: none"> Add a definition for “sub-underwriters” to clarify the disclosure of discounts and commissions.
<p>Item 512 (Undertakings)</p>	<ul style="list-style-type: none"> Item 512(c): eliminate Item 512(c) (requiring a registrant to include undertakings if it registers a warrant or rights offering to existing security holders and the securities not purchased by such security holders are reoffered to the public) as it is duplicative of information required to be disclosed under Item 512(a)(1)(iii) (requiring disclosure of any material information with respect to the plan of distribution for securities not previously disclosed in the applicable registration statement or any material change to such information). Item 512(d): eliminate Item 512(d) (requiring a registrant to include undertakings if the securities registered are offered at competitive bidding to underwriters) in order to reflect the rescission of Rule 50 under the Public Utility Holding Company Act of 1935. Item 512(e): eliminate Item 512(e) (requiring a registrant to deliver, along with the prospectus, the annual and quarterly reports incorporated by reference in the prospectus, as required by Form S-2) in order to reflect the elimination of Form S-2 pursuant to Securities Offering Reform. Item 512(f): eliminate Item 512(f) (requiring a non-reporting registrant in an underwritten equity offering to undertake to provide to the underwriters at the closing the certificates required by the underwriter to permit prompt delivery to each purchaser) in order to reflect the current settlement of securities trades through the National Securities Clearing Corporation (“NSCC”) and The Depository Trust Company (“DTC”).
<p>Item 601 (Exhibits)</p>	<ul style="list-style-type: none"> Require registrants to file a description of each class of their registered securities as an exhibit to Form 10-K (the exhibit would mirror the disclosure required under Item 202). Item 601(b)(2): allow a registrant to omit attachments and schedules (not containing material information) filed with exhibits, and instead allow the registrant to include a brief description of the nature of the contents of the omitted attachment or schedule with an agreement to furnish the omitted document to the SEC, if requested. Item 601(b)(10)(i): limit the two-year look back period for the filing of material contracts not made in the ordinary course of business to newly reporting registrants. Item 601(b)(21): require disclosure of legal entity identifiers (“LEIs”) for the registrant and its “significant subsidiaries” under Regulation S-K.
<p>Manner of Delivery Recommendations</p>	<ul style="list-style-type: none"> Require machine-readable tagging (using eXtensible Business Reporting Language (XBRL)) for all information included on the cover page of periodic and current reports, and require registrants to include on the cover page of such periodic and current reports a ticker symbol for each class of its securities registered under the Securities Exchange Act of 1934. Require a registrant to include a hyperlink whenever a web address is required to be disclosed.

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